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No. 86-1153

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

FBK REALTY CORP.,

Petitioner,

against

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Petitioner's Reply Memorandum in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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In his brief in opposition to *certiorari* the Respondent stresses three issues which require a reply from the Petitioner: (1) Petitioner's alleged relative lack of standing to raise the issue of vicarious liability; (2) the cases supporting broad police-power authority to regulate land use through zoning; and (3) the absence of "dollars and cents" proof of the extent to which Petitioner was deprived of the use and enjoyment of its property.

We intend to clarify these issues as follows: (1) the finding of "harassment" against the Petitioner is non-responsive and misleading; (2) the decision of the United States Court of Appeals in *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984) is inapposite; and (3) the circumstances of this case render the traditional police-power rationale and measurement-of-deprivation criteria inapplicable.

1. The Definition of "Harassment"

In the original petition we observed that we would assume, *ad arguendo,* the validity of the Respondent's finding that the Petitioner had itself "harassed" tenants at

the subject premises. Though, as noted, the administrative determination which produced that finding was highly tainted with violation of procedural due process of law (which the Respondent does not deny), that is not the point. As we have argued, if Section 96-109 of the Zoning Resolution is unconstitutional, it is thus *ab initio* and, as regards issuance of an Alteration Permit, the question of "harassment" was properly immaterial in the first instance.

Moreover, the word "harassment" has a negative emotional impact which might tend to prejudice even the most objective tribunal. The way in which the City of New York defines "harassment" should be clarified.

At page 7 of the Respondent's brief, "harassment" is defined as " * * * failure to maintain and repair, the failure to provide security, heat, and hot water, and inducing tenants to vacate apartments." Thus the Respondent has admitted that "harassment" constitutes a very broad spectrum of action and inaction; the expression includes acts which might, even unintentionally, have a conceivable tendency to encourage a tenant to vacate. "Harassment" thus includes not only the deliberate failure to provide all services required by city tenancy regulations, but also the *inability* (as here) to keep the premises impregnable against break-ins, and to provide janitorial services at a level subjectively acceptable to the Respondent, who sat as both judge and prosecutor below.*

2. *Sadowsky v. City of New York* Distinguished

The Respondent's reference to *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984) is entirely misplaced. So-called "Local Law 19" does preclude conversion of

* The record in this matter shows that, at the time the Petitioner bought the building, two of the several apartments in the building were occupied by tenants, and that those tenants are still in occupancy. The same is apparently true of the periods of ownership of the Petitioner's two immediate predecessors in title. Obviously, if the owners' acts were calculated to cause tenants to vacate, they were not very successful.

single-room occupancy buildings to other uses, based on prior "harassment." But that is where the similarity of Local Law 19 to Section 96-109 ends.

What the Respondent carefully fails to note is that Local Law 19 has a 3-year limitation period, going both ways. The statutory prohibition against those conversions may not be based on alleged "harassment" which took place more than three years before; similarly, the preclusion of conversions extends for only three years after the "harassment" finding.

Here, as previously noted, the examination into prior acts of alleged harassment extends, conceivably, to the time the building was first constructed, and the statutory prohibition against issuance of an Alteration Permit runs with the land forever.

The Respondent argues that, as a practical matter, difficulties of proof will preclude an examination of alleged "harassment" going back *too* far in the past. This argument is non-responsive, since Due Process is not something which may be permitted to depend upon vagaries of available proof. Moreover, since the Respondent *did* examine acts which took place over eight years prior to the hearing, and by two prior owners removed from the within Petitioner, the argument is also disingenuous.

3. The Inapplicability of the Police-Power Cases

In final support of his position, the Respondent cites the standard police-power cases, which generally uphold, in the face of constitutional challenge, zoning restrictions on land use. *See e.g., United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, 106 S.Ct. 455 (1985); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135 (2d Cir. 1984), *cert.* denied *sub nom., 40 Eastco v. City of New York*, 470 U.S. 1087 (1985); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983).

In these cases, the property owner was prevented by law from utilizing property in the most profitable way, *i.e.*, by quarrying or by excavating close to the water line (*Pompa* and *Goldblatt);* by filling in wetlands (*Riverside Bayview*); or by using a large floor-area ratio (*Park Avenue Tower*). In all of these cases, one vital aspect was different from the situation presented in our petition: The property owners in these cases had *alternatives.* Though they were not as profitable as the precluded uses, there were other ways in which the owners could use their respective properties.

The within Petitioner has no such alternatives. Because of a myriad of other city and state rent laws, *the Petitioner must continue to operate the subject property as a residential multiple dwelling, and nothing else.* This situation must obtain for so long as the present tenants wish to occupy their respective apartments. Petitioner does not even have the relative luxury of razing the building and letting the land lie fallow. That is the very reason the Petitioner's renovation plans included a complete remodeling and renovation of the two occupied apartments, so that the present tenants could occupy them, as rent-controlled tenants, indefinitely.*

It is not simply the case, moreover, that the Petitioner has no alternatives in terms of use. The same city rent regulations put *affirmative* obligations upon Petitioner to provide a whole array of services to the tenants, which apply notwithstanding the tenants' failure to pay any rent for several years. Given the prohibition contained in Section 96-109, there is no way the Petitioner can lawfully remedy this situation.

The Respondent harps on Petitioner's ability to carry out "incidental" alterations and repairs. Our reply to this is twofold: First, there *is* no provision for such "incidental" alterations in any known law or regulation. Second,

* The Respondent's characterization of Petitioner's proposal as a "luxury" project is inaccurate.

Respondent does not deny that the entire heating, plumbing and electrical systems of the subject building require top-to-bottom renovation or replacement. Nor does he deny that failure to make such systemic repair or replacement itself constitutes "harassment" of tenants as defined by City law. But such repair or replacement *cannot* be effected without an Alteration Permit, which *cannot* issue, pursuant to Section 96-109, because of the finding of prior "harassment!"

This is the reason why the Respondent's references to the failure to establish the "extent" of the "deprivation" below, *MacDonald, Sommer & Frates v. Yolo County*, ___ U.S. ___, 106 S.Ct 2561 (1986), is such a cruel joke. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the subject property was limited to development as single-family homes, but at least that owner was permitted to do everything necessary to construct those homes pursuant to law and realize whatever financial profit might accrue from such development.

Here, pursuant to Section 96-109, Petitioner must, in perpetuity, operate the premises as a residential multiple dwelling, necessarily at a financial loss, without the legal ability to improve or upgrade essential systems for the benefit of the tenants, which was the ostensible reason for enactment of the statute in the first place.

The Respondent asserts that the courts are not permitted to second-guess local governments in the context of the public policy behind land use controls. So long as the controls "substantially advance legitimate state interests," *United States v. Riverside Bayview Homes, Inc., supra*, ___ U.S. ___, 106 S.Ct. at 459, we agree. But the controls set forth in Zoning Resolution Section 96-109 can only have the effect of keeping the so-called Clinton District a foul and decaying slum in perpetuity. Such will certainly not justify the statutory prohibition against any meaningful improvement of the Petitioner's property. Since the

prohibition thus constitutes a taking of Petitioner's property without compensation or a deprivation thereof without due process of law, the within Petition should be granted.

Respectfully submitted,

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